IN THE

Supreme Court of the United States

OCTOBER TERM, 1921

No. [redacted]33

NORTH CAROLINA RAILROAD COMPANY,
Petitioner,

vs.

EVELYN K. LEE, ADMINISTRATRIX,
Respondent.

REPLY BRIEF FOR PETITIONER.

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PRESS OF THE BYRON S. ADAMS PRINTING COMPANY, WASHINGTON

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Respondent.

REPLY BRIEF FOR PETITIONER.

Pages 2 and 3 of Respondent's brief contain statements of fact not in the case below and not in the record here. There is no reference in the entire record to any lease from North Carolina Railroad to the Richmond & Danville Railroad. The record (p. 1) states the North Carolina Railroad leased its said road to the Southern Railway for ninety-nine years. This is admitted in the answer. There is not a word in the record as

to the maintenance of the corporate existence of the North Carolina Railroad; not a word as to what functions the North Carolina Railroad has continued to perform; not a word as to whether or not the North Carolina Railroad has exercised the functions of a common carrier; not a word as to whether the engines, cars, rails, etc., delivered to its lessee have been worn out, and not a word as to whether or not on December 26, 1917, it had any physical properties or equipment.

Respondent, on page 3 of her brief, says:

> "It is for this reason no doubt that possession of it was never taken and control of it was never assumed by the Director General of Railroads. Its name is not included in the list of 165 carriers or systems of transportation which were taken over by him and which is referred to by this court in the case of 'Missouri, etc. vs. Ault, 256 U. S. .....' "

If Respondent means to say that possession of the North Carolina Railroad *corporation* was not taken, that is correct. If it is meant that the physical property, equipment, and appurtenances were not taken, that is not correct. The record (p. 3) shows:

> "* * * that said railway was being operated, maintained and controlled at the time mentioned by the Government of the United States by and through Walker D. Hines, Director General of Railroads, by virtue of the acts of Congress of the United States and the orders of the President of the United States."

In addition to this, in "Defendant's Statement of Case on Appeal to the Supreme Court" of North Carolina, the following facts are stated:

> "* * * that at that time and previous thereto, to-wit: since the first day of January, 1918, the operation and control of the properties of The North Carolina Railroad and its lessee, The Southern Railway Company, including the Pomona Yards, had been taken over by the United States Railroad Administration; and that said properties were being operated under the acts of Congress and the orders of the President of the United States, by the Director General of Railroads; and that the agents and employees operating the same were employed by him and under his control; that the plaintiff's intestate, at the time of his injury and death, was employed by said Director General of Railroads, and so were the other agents and employees, whose negligence, the plaintiff alleged, was the proximate cause of her intestate's death."

To support the contention that possession was not taken of the railroad of the North Carolina Railroad Company, Respondent quotes from Petitioner's brief (Rec., p. 5), where it is said:

> "There is no relationship of any kind whatsoever between the Petitioner and the Director General of Railroads. Your Petitioner is not named as one of the roads taken over for government operation during the war period. So far as these parties are concerned it is not known to the Federal government. None of its properties were taken from it because its properties at the time were in possession and

control of its lessee, the Southern Railway Company."

This is a correct quotation from Petitioner's brief, but an entirely erroneous impression is made by not quoting more fully from the brief or stating the connection in which the words were advisedly used. The Respondent had contended in the lower state court that the relationship of lessor and lessee existed between the North Carolina Railroad Company and the Government of the United States, and the lower court had so charged (Rec., p. 5). It was in answer to this contention, and under sub-heading, "Rule of Lessor and Lessee Not Applicable," that Petitioner used the language quoted. It reiterates the correctness of its statements and all its conclusions therefrom. The relationship of lessor and lessee must be a contractual relationship. There was nothing in the record or in the facts to show a contractual relationship of any kind between the North Carolina Railroad Company and the Government of the United States.

Respondent argues on page 9 of brief that the refusal of the Court to give the charge set out as Assignment of Error No. 1 (Rec., p. 7) is not error. The charge is as follows:

> "The evidence in this cause showing that at the time of the injury to the plaintiff's intestate which resulted in his death, the railroad properties, including the Pomona Yards and the equipment thereon, were not being

operated by the defendant or its lessee, the Southern Railway Company, but by the United States Railroad Administration, and that the plaintiff's intestate was an employee of said United States Railroad Administration, and it being admitted that the Director General of Railroads has not been made and is not a party defendant in this action, the jury should answer the first issue No."

Respondent says "if this request contained an assumption or assertion that such properties belonged to defendant, then such assumption or assertion was notoriously contrary to the facts," etc. (Res. brief, p. 9). The charge speaks for itself. It says the railroad properties, including Pomona Yard, the place of the accident (Rec., p. 2) was being operated by the United States Railroad Administration. The record so shows (Rec., p. 5). They were the railroad properties which plaintiff in her complaint had said were leased to Southern Railway Company (Rec., pp. 1 and 2).

Respondent, while conceding that under the Ault Case, 256 U. S. ...., there would be no liability on the part of the Southern Railway Company *corporation* if the cause of action had arisen on its own properties, yet contends that because it arose on the properties of the North Carolina Railroad Company *corporation,* which were under lease to the Southern Railway Company, there would be liability. This is indeed a strange argument. It is to say that if the accident had happened under identical facts a few miles distant

on the tracks owned by the Southern Railway Company *corporation,* there would be no liability; yet, because it happened where it did, on property in the possession of the Southern Railway Company but owned by another corporation, to-wit, the North Carolina Railroad Company, then there would be liability in this case. Surely this court is not going to follow such fallacious reasoning. The Southern Railway Company, that is, the corporate entity, the *corporation itself,* was not taken over by the Government; and, under the existing law, it is not liable to the respondent, yet she contends that the North Carolina Railroad Company, the *corporation,* which likewise was not taken over, is liable for the acts of the Director General of Railroads in operating the properties owned and in the possession of the Southern Railway Company under lease. The Ault case *supra* is clearly decisive of this question. Mr. Justice Clark distinctly reaffirmed the doctrine of that case in delivering the opinion of this court in the case of Dahn v. Davis, Agent, No. 166, October Term, 1921, opinion rendered April 10, 1922, in the following language:

> "It was definitely held in Missouri Pacific Railroad Company v. Ault, Supreme Court Reporter, Volume 41, p. 593, that, at all of the times herein involved, section 10 of the Federal Control Act permitted the Government, through its Director General of Railroads, to be sued for any injury negligently caused on any line of railway in his custody, precisely as a common carrier corporation operating

such road might have been sued, and that recovery, if any, would be from the United States.

"Thus, plainly the petitioner had the right to sue the Director General of Railroads for negligently injuring him, and if successful his recovery must have been from the United States."

We are not sure we follow plaintiff on p. 10 of her brief, but, as we understand the contention, it is, since the North Carolina Court has held the North Carolina Railroad liable for damages arising from negligence of its lessee, Southern Railway, it was not error for the Court to hold the North Carolina Railroad liable for the negligence of the servants and agents of the Director General of Railroads, who had taken possession of the property under the Acts of Congress.

That is the meat of the case. We say that, under the Ault Case and others, the North Carolina Railroad corporation can not be held liable for the negligence of the agents of the Director General causing the death of an employee of the Director General. If we are right, the case should be reversed.

The North Carolina Railroad Company is held liable in the case of Logan vs. Railroad, 116 N. C., 940, because:

"A railroad corporation cannot escape its responsibility by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either."

The basis of liability in that case is that because the North Carolina Railroad leased its property to Southern Railway Company the relationship of lessor and lessee existed. In this case there is no such relationship, and, therefore, no liability on the part of the North Carolina Railroad for the acts of the government's agents; but, if such relationship existed it can only be found by a construction of the Federal Control Act of Congress. The Court erred in construing said Act of Congress as creating such relationship, and that error deprived the North Carolina Railroad of a right of exemption from liability secured under said Congressional Act.

Respondent says the ruling did not deprive Petitioner of any right, privilege or immunity, because, it is said, the North Carolina Railroad is not within its provisions. In arguing this, counsel again, inadvertently no doubt, goes out of and contrary to the record and says no physical property or equipment of defendant was taken over (Res. brief, p. 14). The railroad was taken over. Be this as it may, the Federal Control Act had to be and was construed by the lower court and construed wrong. Defendant is entitled under that Act to be held harmless for acts of governmental agents.

Respectfully submitted,

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